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No. ———

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

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RAVEN'S HOLLOW, LTD., AIRLIE FOUNDATION, AIRLIE TRUST AND MURDOCK HEAD,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

———

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

———

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QUESTIONS PRESENTED

In *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983) ("*Sells*"), and *United States v. Baggot*, 463 U.S. 476 (1983) ("*Baggot*"), this Court held that Fed. R. Crim. P. 6(e)(3)(C)(i) ("Rule 6(e)") authorizes disclosure of grand jury materials to federal government personnel for use in noncriminal proceedings only pursuant to a court order entered upon a showing of "particularized need" for the materials for use "preliminarily to or in connection with a judicial proceeding." The questions presented are:

1. Whether, following the announcement of *Sells* and *Baggot*, a district court must vacate prospectively a prior Rule 6(e) order authorizing disclosure of grand jury materials that was obtained without the showings required under those decisions?

2. Whether the continuing access by Internal Revenue Service personnel to grand jury materials pursuant to a prior Rule 6(e) order, after *Sells* and *Baggot* made clear that the order was unlawfully obtained, constitutes "disclosure" of such materials prohibited by Rule 6(e)?

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit, *United States v. (Under Seal)*, is reported at 783 F.2d 450 (1986), and is reprinted in the appendix hereto, Pet. App. 1a. The oral decision of the United States District Court for the Eastern District of Virginia is reprinted as transcribed in the appendix hereto, Pet. App. 10a.

JURISDICTION

The judgment of the Court of Appeals was entered on February 7, 1986. The timely petition for rehearing was denied on March 24, 1986. On June 13, 1986, Chief Justice Warren E. Burger extended the time within which

to file a petition for a writ of certiorari to and including August 21, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED

This case involves Fed. R. Crim. P. 6(e)(3)(C)(i), which provides in pertinent part:

> (C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—
>
> (i) when so directed by a court preliminarily to or in connection with a judicial proceeding;
>
> . . . .

STATEMENT OF THE CASE

In 1978, a federal grand jury began an investigation of petitioner Dr. Murdock Head and certain entities with which Dr. Head was associated, including petitioners Airlie Foundation, Airlie Trust, and Raven's Hollow, Ltd. ("Airlie entities").[1] In July 1979, the grand jury returned a thirteen-count indictment against Dr. Head. At his trial, Dr. Head was exonerated of all but one count

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[1] Dr. Head was the executive director of the Airlie Foundation until 1979. The Foundation is a nonprofit, tax-exempt educational organization whose activities include conducting seminars and producing documentary films. The Foundation's films, most of which have dealt with topics of public concern such as air pollution, drug abuse and cancer, have won 20 International Film Festival Awards and 13 Emmy Awards from the Academy of Television Arts and Sciences. Raven's Hollow, Ltd. ("Raven's Hollow") provides technical and production assistance in the making of films by the Foundation. Airlie Trust is a trust created by Dr. Head in 1974 to provide income for the Foundation.

Pursuant to Rule 28.1 of this Court, petitioners state that Raven's Hollow is currently wholly owned by Kimmaren Corporation, and that Airlie Foundation has no parent companies, subsidiaries or affiliates.

of conspiracy. His conviction on that charge was reversed, *United States v. Head*, 641 F.2d 174 (4th Cir. 1981), and he was subsequently retried and convicted.

In November 1979, at the conclusion of Dr. Head's initial trial, the government filed an *ex parte* application in the United States District Court for the Eastern District of Virginia under Fed. R. Crim. P. 6(e) ("Rule 6(e)") seeking authority to disclose to the Internal Revenue Service ("Service" or "IRS") various grand jury materials obtained during the investigation of Dr. Head and the Airlie entities. The Service sought the materials for use in an audit of the civil tax liability of Dr. Head, Airlie Trust, and Raven's Hollow, and to determine whether Airlie Foundation's tax-exempt status should be revoked. In support of its application, the government, as petitioners later learned, merely alleged that the materials sought to be disclosed had "some rational connection" with an existing or contemplated judicial proceeding; no particularized need for disclosure was either claimed or demonstrated. Joint Appendix at 34, *United States v. (Under Seal)*, 783 F.2d 450 (4th Cir. 1986). On December 4, 1979, the district court granted the government's motion, authorizing the United States Attorney to disclose secret grand jury materials to the IRS.

In 1980, the IRS assessed tax deficiencies against Dr. Head, Raven's Hollow, and Airlie Trust. Promptly thereafter, they filed petitions in the United States Tax Court contesting the deficiencies. In addition, on December 15, 1980, Airlie Foundation was notified that an IRS administrative proceeding—known as a technical advice request—would be initiated to consider whether to revoke Airlie Foundation's tax-exempt status. Throughout the Tax Court and the IRS administrative proceedings, petitioners have maintained that the IRS is disclosing and using secret grand jury materials in violation of Rule 6(e).

On June 30, 1983, this Court held in *United States v. Sells Engineering, Inc.*, 463 U.S. 418 ("*Sells*"), that the

federal government must make a showing of "particularized need" in order to obtain a Rule 6(e) order authorizing disclosure of grand jury materials for use in connection with the government's civil law enforcement activities. On the same day, the Court held in *United States v. Baggot*, 463 U.S. 476 (*"Baggot"*), that Rule 6(e) does not authorize disclosure of grand jury materials to the IRS for use in determining tax liability because such use is not "preliminar[y] to or in connection with a judicial proceeding" within the meaning of the Rule.

The Tax Court proceedings had been held in abeyance pending this Court's decisions in *Sells* and *Baggot*. After these decisions were announced, further delays in both proceedings occurred while the Service reconsidered its position.[2]

On November 2, 1984, an attorney for the Service in the Tax Court proceedings informed counsel for petitioners that he intended to begin preparing the Tax Court cases, and that despite the Supreme Court's decisions in *Sells* and *Baggot*, he intended to utilize the grand jury materials in his trial preparations and at the trial. The attorney also stated that in regard to the administrative proceedings concerning Airlie Foundation's tax-exempt status, the Service's National Office had already begun to review the technical advice request, which contains grand jury materials as exhibits.[3]

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[2] After the *Sells* and *Baggot* decisions, counsel for the petitioners requested a conference on the effect of those decisions on petitioners' cases. Counsel for the Service indicated that the Service was evaluating this issue and would contact petitioners when it had been resolved. The government did not inform petitioners' counsel of the IRS' position until November 2, 1984, after the Tax Court held in *Kluger v. Commissioner*, 83 T.C. 309 (1984), that *Baggot* and *Sells* should not be applied retroactively.

[3] At present, the Tax Court proceedings are still in their early stages and the technical advice request is still pending in the exempt-organization division of the IRS' National Office.

The Service had thus clearly indicated that grand jury materials would be disclosed to additional government personnel in violation of the policy of grand jury secrecy codified in Rule 6(e) and articulated in *Sells* and *Baggot*. For that reason, on December 17, 1984, petitioners filed a motion in the district court requesting the court to vacate its prior Rule 6(e) order and thus to prevent further disclosures of grand jury materials unless the government made the showings required by *Sells* and *Baggot*.

Petitioners' motion to vacate rested on two grounds. It asserted, first, that further disclosure of grand jury materials to the Service in connection with the pending administrative proceeding concerning Airlie Foundation's tax-exempt status was impermissible under Rule 6(e) because, as this Court held in *Baggot*, such disclosure was not "preliminar[y] to or in connection with a judicial proceeding" within the meaning of the Rule. And second, relying on the *Sells* decision, petitioners contended that Rule 6(e) barred further disclosure of grand jury materials in connection with both the Tax Court and administrative proceedings, because no "particularized need" for disclosure had been shown.

On February 1, 1985, the district court, in a brief bench opinion, denied petitioners' motion. The district court first determined that *Sells* and *Baggot* should not be applied retroactively.[4] Pet. App. 11a. Based on this determination, the district court concluded that its prior Rule 6(e) order should also not be vacated *prospectively* so as to bar further disclosure of grand jury materials.

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[4] In addition to seeking to prevent further disclosures of the grand jury materials, petitioners had also sought a declaration that all prior disclosures of grand jury materials pursuant to the district court's order had been improper on the ground that this Court's decisions in *Sells* and *Baggot* retroactively invalidated the order. The district court denied the declaratory relief sought by petitioners on the ground that *Sells* and *Baggot* should not be applied retroactively. This request for declaratory relief is not at issue in this petition.

Id. In so doing, the court explicitly recognized that its decision would allow the Service to continue to disclose grand jury materials in connection with the pending Tax Court and administrative proceedings. When petitioners sought clarification of the court's ruling regarding further disclosure, the following discussion took place:

> Mr. Ferrel [for the United States]: Your honor, if *Baggot* and *Sells* are only going to apply prospectively . . ., [the exempt-organization branch] . . . can continue to use this information and the [T]ax [C]ourt people can continue to use it.
>
> The court: Mr. Rogovin, any comment on that?
>
> Mr. Rogovin [for petitioners]: Yes . . . your honor. The materials are currently being disclosed and if the *Sells* opinion means anything about the continued disclosure, it means that these materials . . . cannot . . . continue[] to be used in this fashion. If the government wants to apply for a 6(e) order with respect to this use, they would presumably be blocked by *Baggot*.
>
> The court: Mr. Ferrel, do you want to use it in the future? The government want[s] to use it in the future?
>
> Mr. Ferrel: Yes, you honor, of course.
>
> The court: I'm going to allow them to use it in the future. I'll deny your motion.

Pet. App. 11a-12a.[5]

On February 7, 1986, a divided panel of the Court of Appeals for the Fourth Circuit affirmed. The majority first determined that *Sells* and *Baggot* did not retroactively invalidate the district court's prior Rule 6(e)

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[5] The district court thereafter denied petitioners' motions for an injunction to protect against irreparable harm pending appeal. Pet. App. 13a-14a. On March 18, 1985, a divided court of appeals panel affirmed the denial of an injunction. Pet. App. 15a.

order, Pet. App. 5a-7a, a determination petitioners are not challenging before this Court. From this premise, however, the majority incorrectly concluded that because the Rule 6(e) order was not retroactively invalidated, *future* disclosure of grand jury materials to the Service would not violate the Rule. *Id.* at 7a. Moreover, the majority erroneously stated that the grand jury materials at issue had been "fully disclosed" to the Service and petitioners before *Sells* and *Baggot* were decided.[6] *Id.*

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[6] The majority's statement was inaccurate in two respects. First, there is absolutely no basis in the record for the statement in the majority opinion that all of the grand jury materials disclosed to the Service had also been disclosed to petitioners in preparation for their Tax Court case and the administrative proceedings. Pet. App. 3a. Although before Dr. Head's trial on the criminal charges, the government, pursuant to Fed. R. Crim. P. 16, afforded counsel for Dr. Head access to the grand jury transcripts of witnesses the government intended to call at trial, other grand jury materials have not been disclosed to petitioners. Indeed, on March 24, 1981, petitioners filed a motion in the district court under Rule 6(e) seeking disclosure of grand jury materials to them for use in preparing the Tax Court cases and the technical advice proceeding. The Service opposed the motion with respect to virtually all the materials, except the materials petitioners themselves supplied to the grand jury. On April 3, 1981, the district court denied petitioners' motion for disclosure, except with respect to petitioners' own materials.

And second, in their motion and before the court of appeals, petitioners contended, and the Service did not dispute, that disclosure of secret grand jury materials to *additional* IRS personnel would take place unless the motion was granted. These additional disclosures would violate Rule 6(e), for as this Court recognized in *Sells*:

> "Each day this order remains effective the veil of secrecy is lifted higher by disclosure to additional personnel and by the continued access of those to whom the materials have already been disclosed. We cannot restore the secrecy that has already been lost but we can grant partial relief by preventing further disclosure."

463 U.S. at 422-23 n.6 (quoting *In re Grand Jury Investigation No. 78-184 (Sells, Inc.)*, 642 F.2d 1184, 1188 (9th Cir. 1981), *aff'd sub nom. United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983)). *See* pp. 20-22, *infra.*

Based in part on this misconception, it concluded that further disclosure to the Service was not inconsistent with the grand jury secrecy objectives of Rule 6(e). *Id.*

In dissent, Judge Butzner correctly recognized that the mere fact that *Sells* and *Baggot* did not retroactively invalidate the prior Rule 6(e) order did not entitle the Service to continued access to the grand jury materials after the decisions were announced.

> Although [*Sells*] and [*Baggot*] do not retroactively invalidate a prior disclosure order entered pursuant to Fed. R. Crim. P. 6(e), the government is not entitled to continued access to the grand jury materials after the Supreme Court's decisions in *Sells* and *Baggot* without showing a particularized need for the material. *See Thorpe v. Housing Authority*, 393 U.S. 268, 281 (196[9]) (an appellate court must apply the law in effect at the time it renders its decision).

Pet. App. 7a-8a (some citations omitted).

Judge Butzner reasoned that "[i]t is the prospective application of *Sells* and *Baggot* to disclosures occurring after the cases were decided that entitles the [petitioners] to relief." Pet. App. 8a. Finding that "[t]he government's continued access to the grand jury materials violates the policy of protecting grand jury secrecy ackowledged by the Supreme Court in *Sells*," *id.*, Judge Butzner concluded:

> The government's continued access to the grand jury materials after a change in the applicable law constitutes disclosure that is subject to the requirements of *Sells* and *Baggot*. *In re Grand Jury Investigation*, 774 F.2d 34, 40-42 (2d Cir. 1985). *See also In re Sells*, 719 F.2d 985, 990-92 (9th Cir. 1983).

Id. He therefore indicated he "would remand the case with directions to prohibit further disclosure of the grand jury material in pending civil and administrative pro-

ceedings unless the government shows a particularized need." *Id.*

On March 24, 1986, the Fourth Circuit, over Judge Butzner's dissent, denied petitioners' request for rehearing. Pet. App. 9a.

REASONS FOR GRANTING THE PETITION

This case presents a question of considerable importance regarding the proper application of two of this Court's decisions on the ongoing disclosure of grand jury materials pursuant to a previously entered Rule 6(e) order. The decision below permits the Internal Revenue Service to continue to disclose grand jury materials after this Court's decisions in *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983), and *United States v. Baggot*, 463 U.S. 476 (1983), without the showing of "particularized need" for the materials "preliminar[y] to or in connection with a judicial proceeding" required under those decisions. In so doing, the decision directly conflicts with the decision of the Court of Appeals for the Ninth Circuit in *In re Sells*, 719 F.2d 985 (1983) (*"Sells II"*), which held that a pre-*Sells* and *Baggot* Rule 6(e) order that authorized disclosure of grand jury materials to the Service without the showings required by those decisions must be vacated prospectively so as to prohibit further disclosure of such materials in violation of Rule 6(e).

The decision below also squarely conflicts with decisions of this Court concerning both the responsibility of a court to modify the prospective effect of its order when subsequent legislative enactments or judicial decisions make clear that the order is contrary to law, *e.g.*, *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961), and the duty of a court to apply the law in effect at the time of its decision. *E.g.*, *Thorpe v. Housing Authority*, 393 U.S. 268 (1969). Finally, in concluding from the fact that certain grand jury materials had already been dis-

closed that additional disclosures would not violate Rule 6(e), the panel majority's decision is in conflict with this Court's decision in *Sells*, the Ninth Circuit's decision in *Sells II*, and the decision of the Court of Appeals for the Second Circuit in *In re Grand Jury Investigation (John Does I-V v. United States)*, 774 F.2d 34 (1985), *cert. granted sub nom. United States v. John Doe, Inc. I*, 54 U.S.L.W. 3777 (U.S. May 27, 1986) (No. 85-1613) (*"John Doe, Inc. I"*).

I. THE HOLDING OF THE COURT BELOW THAT THE PRIOR RULE 6(e) ORDER SHOULD NOT BE VACATED PROSPECTIVELY IS IN CONFLICT WITH THE DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT IN *SELLS II* AND WITH APPLICABLE DECISIONS OF THIS COURT

In *Sells*, this Court concluded that the important concerns underlying the traditional rule of grand jury secrecy required that the federal government make the same showing of "particularized need" required of private litigants before obtaining an order under Rule 6(e) authorizing disclosure of grand jury materials for use in civil law enforcement activities.[7] 463 U.S. at 442-46. *See also Illinois v. Abbott & Associates, Inc.*, 460 U.S. 557 (1983) (holding that the particularized-need standard applies to requests for disclosure to state attorneys general). And, acknowledging that Rule 6(e) "reflects a judgment that not . . . every valid governmental purpose is an appropriate reason for breaching grand jury secrecy," the Court in *Baggot* held that grand jury materials may not be disclosed to the Internal Revenue Service for use in connection with an audit of civil tax liability because

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[7] The particularized-need standard is described in detail in *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 222-23 (1979). *See also Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 398-401 (1959); *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681-83 (1958).

such use is not "preliminar[y] to or in connection with a judicial proceeding" within the meaning of the Rule. 463 U.S. at 480.

The decision below authorizes the Service to continue to use and disclose grand jury materials—although such disclosure is clearly forbidden by Rule 6(e) as interpreted in *Sells* and *Baggot*—because the Service obtained a Rule 6(e) order before those decisions were announced. In this respect, the decision is in conflict with the Ninth Circuit's decision in *Sells II* and with applicable decisions of this Court.

A. In Permitting Continuing Disclosure Of Grand Jury Materials Without The Showings Required By *Sells* And *Baggot*, The Decision Below Is In Direct Conflict With *Sells II*

The court below in this case, and the Court of Appeals for the Ninth Circuit in *Sells II*, were faced with the same legal issue: should pre-*Sells* and *Baggot* Rule 6(e) orders, which were issued without the showings those decisions require, be vacated so as to prohibit further disclosures of grand jury materials. The decision below affirming the district court's refusal to vacate its prior Rule 6(e) order is in direct conflict with the Ninth Circuit's judgment in *Sells II* vacating a district court's Rule 6(e) order because it failed to comply with the standards articulated in *Sells* and *Baggot*.

Sells II arose when, in June 1980, the government moved for disclosure of grand jury materials to the IRS for use in a civil tax audit. 719 F.2d at 988. The district court granted the motion and refused a request for a stay pending appeal. *Id.* The Ninth Circuit heard oral argument on the appeal in March 1982, but ordered the submission withdrawn pending decisions by this Court in *Sells* and *Baggot*. Following the announcement of those decisions, the appeal was resubmitted.

In its decision vacating the prior Rule 6(e) order, the Ninth Circuit first found that "[u]nder the principle enunciated in *Baggot*, it is indisputable that disclosure pursuant to [Rule 6(e)] was inappropriate . . . ." 719 F.2d at 989-90. The court then went on to consider "whether *Baggot* controls the disposition of this appeal," and concluded that *Baggot* required the prior order to be vacated. *Id.* at 990.

The Ninth Circuit's analysis was similar to that undertaken by Judge Butzner in his dissent in the instant case. *See* Pet. App. 7a. The court first referred to the well-settled general rule that "an appellate court should apply the law as it stands on the date of the appellate decision." 719 F.2d at 990 (citing *Thorpe v. Housing Authority*, 393 U.S. 268, 281-83 (1969), and *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801)). It then declined to make an exception to this rule, finding that no "manifest injustice" would result from application of the *Baggot* decision. *Id.* at 990 n.3. *See Bradley v. School Board of Richmond*, 416 U.S. 696, 717 (1974). Finally, the court rejected the government's assertion that the appeal had been mooted because, pursuant to the Rule 6(e) order, grand jury materials had already been disclosed to an IRS agent for determination of the appellants' tax liability. It held that further disclosures to the Service for use in later stages of the tax proceedings would constitute "a continued and increasingly wide breach of grand jury secrecy." 719 F.2d at 990 (citing *Sells*, 463 U.S. at 422 n.6). Because the continuing disclosures violated Rule 6(e) as interpreted in *Baggot* and *Sells*, the court vacated the prior Rule 6(e) order, stating that to obtain a new disclosure order the Service must make the showing of particularized need required by *Sells*.[8] 719 F.2d at 992.

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[8] The only other court to date to address the prospective impact of *Sells* and *Baggot* on previously entered Rule 6(e) orders reached the same result as the Ninth Circuit did in *Sells II*. In *In re Grand*

The decision below and *Sells II* thus reached conflicting conclusions on the question whether previously entered Rule 6(e) orders should be vacated prospectively so as to bar further disclosure of grand jury materials in circumstances in which *Sells* and *Baggot* forbid such disclosures.[9] Because the issue is likely to arise as long as the Service continues to use and disclose grand jury materials pursuant to pre-*Sells* and *Baggot* orders, *see, e.g., In re Grand Jury Proceedings (Kluger)*, 631 F. Supp. 1542 (E.D.N.Y. 1986), *appeal docketed*, No. 86-6143 (2d Cir. July 16, 1986) (discussed in note 8, *supra*), plenary consideration by this Court is necessary to resolve this question.

B. The Decision Below Is In Conflict With This Court's Decisions Regarding The Prospective Effect On A Prior Order Of A Change In The Underlying Law

The decision below is also inconsistent with this Court's precedents regarding the impact of an intervening change

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Jury Proceedings (Kluger), 631 F. Supp. 1542 (E.D.N.Y. 1986), *appeal docketed*, No. 86-6143 (2d Cir. July 16, 1986), a case virtually identical to this one, the court had before it a motion to vacate a pre-*Sells* and *Baggot* Rule 6(e) order authorizing disclosure of grand jury materials to the IRS. Citing *Sells II* and Judge Butzner's dissent in the instant case, the court concluded that further disclosure of grand jury materials should be prohibited unless the Service showed a particularized need for the materials. 631 F. Supp. at 1543. *See also DiVivo v. Egger*, 601 F. Supp. 1259, 1262 (D. Md. 1984) (interlocutory order entered barring IRS from further disclosure of grand jury materials pursuant to pre-*Sells* and *Baggot* Rule 6(e) order).

[9] While *Sells II* arose on direct appeal from a Rule 6(e) order and the decision below resulted from the denial of a motion to vacate such an order, the differing procedural postures of the two decisions should not result in different outcomes. At issue in both cases was the prospective effect of *Sells* and *Baggot* on a prior Rule 6(e) order. As is discussed below, under this Court's precedents, an order that is prospective in nature should be modified when there is an intervening change in the law giving rise to the order. *See* pp. 13-17, *infra*.

in the law on the prospective effect of a judicial decree. Those decisions establish that a court should modify the prospective effect of an order when subsequent legislative or judicial pronouncements make clear that the order authorizes conduct prohibited by law. *See System Federation No. 91 v. Wright*, 364 U.S. 642 (1961).

At issue in *System Federation* was whether the district court had properly refused to modify a consent decree prohibiting an employer and certain unions from establishing a union shop. When the decree was entered in 1945, the Railway Labor Act prohibited union shop agreements; in 1951, the statute was amended to permit them. In 1957, the unions moved for an order modifying the decree "to make [it] clear that it shall have no prospective application to prohibit" union shop agreements. 364 U.S. at 645. The lower court denied the motion, and the court of appeals affirmed.

In its opinion reversing the lower court decision, this Court, per Justice Harlan, recognized that ordinarily a district court has "wide discretion" in deciding whether or not to modify an order. *Id.* at 648. But, the Court ruled, when the statute on which the order was based is modified so as to permit conduct that formerly was prohibited, the district court *should* modify its order. Setting aside the fact that the decree at issue had been issued by consent of the parties, the Court stated:

> Had the 1945 decree simply represented relief awarded by the District Court after a trial of the action instituted by petitioners, there could be little doubt but that, *faced with the 1951 amendment to the Railway Labor Act, it would have been improvident for the court to continue in effect this provision of the injunction* prohibiting a union shop agreement *per se* . . . . That provision was well enough under the earlier Railway Labor Act, but to continue it after the 1951 amendment would be to render protection in no way authorized by the needs of safe-

> guarding statutory rights at the expense of a privilege denied and deniable to no other union.

Id. at 648 (emphasis added; citation omitted).[10]

As the *System Federation* Court recognized, its conclusion that a court-imposed decree would have to be modified because of the change in the law was "amply supported by precedent." *Id.* at 649 (citing *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856) (holding that injunction directing removal of bridge from river had to be vacated after Congress declared bridge to be a lawful structure)); *id.* at 650 n.6 (collecting cases). Only two years ago, this Court reaffirmed this conclusion in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984). After quoting *System Federation* for the proposition that a district court's authority to enter an order (in that case, a consent decree) "comes only from the statute which the decree is intended to enforce," the Court stated:

> In recognition of this principle, this Court in *Wright* held that *when a change in the law brought the terms of a decree into conflict with the statute pursuant to which the decree was entered, the decree should be modified.*

467 U.S. at 576 n.9 (emphasis added) (quoting *System Federation*, 364 U.S. at 651). *Accord Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 437 (1976) (holding that district court was required to modify its school desegregation decree because, *inter alia*, it was inconsistent with this Court's intervening decision in *Swann*

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[10] The Court then dispensed with the argument that a different result was required because the decree at issue had been entered with the consent of the parties, finding that the district court's authority to enter the decree derived only from the statute on which it was based, and stating that "[t]he parties have no power to require of the court continuing enforcement of rights the statute no longer gives." *Id.* at 651-52.

v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971)).[11]

Under the principle articulated in the *System Federation* and *Stotts* decisions, the Rule 6(e) order at issue here should be vacated. This Court's decisions in *Sells* and *Baggot* left no doubt that Rule 6(e) prohibits the disclosure of grand jury materials in the circumstances that gave rise to the Rule 6(e) order here. Failing to vacate that order thus allows the disclosure of grand jury materials here when Rule 6(e) flatly prohibits such disclosure. The lower court's refusal to vacate the prior Rule 6(e) order is therefore squarely in conflict with *System Federation* and *Stotts*.[12]

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[11] *See also Theriault v. Smith*, 523 F.2d 601, 601-02 (1st Cir. 1975) (holding that where an intervening Supreme Court decision construing the statute on which a decree was based amounted to "a fundamental change in the legal predicates" of the decree, prospectively vacating the decree was appropriate under Fed. R. Civ. P. 60(b)(5)).

[12] At bottom, the decision of the court below refusing to vacate the Rule 6(e) order was apparently premised on the panel majority's view that "unless *Baggot* and *Sells* apply retroactively to invalidate that order, the continued use of th[e] grand jury material does not violate Rule 6(e)." Pet. App. 6a. The determination that the decisions were not to be given retroactive effect essentially constituted the beginning and the end of the court's analysis. Indeed, the court described its conclusion as follows:

> [W]e hold that *Sells* and *Baggot* do not apply retroactively so as to prohibit the use of grand jury material which was fully disclosed pursuant to a valid Rule 6(e) order before those cases were decided.

Id. at 7a.

Under this Court's precedents, however, the question whether a change in the law is retroactive is wholly irrelevant in determining whether an order having prospective effect must be modified to conform to the change in the law. Indeed, in holding that prospective modification of the decree at issue was required, the *System Federation* Court made no mention of the question whether the change in the law in question should be afforded retroactive effect.

As Judge Butzner recognized in his dissent, Pet. App. 7a-8a, the decision below, in declining to apply *Sells* and *Baggot* in determining whether to prohibit further disclosure of grand jury materials *after* those decisions were announced, is also in conflict with the numerous precedents of this Court expounding "[t]he general rule . . . that an appellate court must apply the law in effect at the time it renders its decision." *Thorpe v. Housing Authority*, 393 U.S. 268, 281 (1969). *See United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801).[13] While the rule admits of an exception where a "manifest injustice"—such as the upsetting of settled expectations—would result, *Bradley v. School Board of Richmond*, 416 U.S. 696, 717 (1974), no such injustice can be said to obtain here because the impact of applying the change in the law is simply to require the government *prospectively* to obey the law.

The decision below is thus squarely in conflict with applicable decisions of this Court regarding the responsibilities of a court when subsequent legislative or judicial pronouncements make clear that its prior order authorizes conduct contrary to law. To ensure that the lower federal courts have adequate guidance regarding their obligations in these circumstances, this Court should give plenary consideration to the questions presented herein.

The retroactivity issue is thus entirely separate from the question whether to modify the prospective effect of a decree. *See In re Grand Jury Proceedings (Kluger)*, 631 F. Supp. at 1543.

[13] While this rule generally is applied where a change in the law occurs while a decision is on direct appeal, the rule is premised on the notion that a court—like the parties before it—is obligated to obey (and thus to apply) the law then in effect. *See The Schooner Peggy*, 5 U.S. at 110. This same consideration requires a court to apply a change in the law when deciding whether prospectively to modify a prior order.

C. The Decision Below Undermines The Traditional Rule Of Grand Jury Secrecy Codified In Rule 6(e) And Results In Fundamental Unfairness To Petitioners

This Court "consistently ha[s] recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979) (citation omitted). Indeed, the need to protect the grand jury system by maintaining grand jury secrecy clearly played a significant role in this Court's decisions in *Sells* and *Baggot*. *See Sells*, 463 U.S. at 444-45; *Baggot*, 463 U.S. at 480.

There can be little doubt in the present case that, as Judge Butzner stated in dissent, the continued access to the grand jury materials permitted by the court below "violates the policy of protecting grand jury secrecy acknowledged by the Supreme Court in *Sells*." Pet. App. 8a. This is the case because the decision below permits continued disclosure of grand jury materials to the IRS in circumstances in which Rule 6(e), as interpreted in *Sells* and *Baggot*, clearly forbids such disclosure.

In so doing, the decision results not only in unwarranted disclosure of grand jury materials, but also in fundamental unfairness to petitioners. After *Baggot*, it is clear that Rule 6(e) forbids the Internal Revenue Service to have access to grand jury materials for use in administrative proceedings, regardless of how compelling the Service's need for the materials may be. And after *Sells*, the Service may no longer have access to grand jury materials for use in connection with Tax Court proceedings without a showing of particularized need. But in the class of cases like the instant one in which the Service obtained pre-*Sells* and *Baggot* Rule 6(e) orders, the decision below permits the Service to persist in using secret grand jury materials in violation of the strictures of the Rule.

This kind of unequal treatment of similarly situated parties is precisely the kind of inequity that this Court has found requires modification of the effect of a prior order. In *Commissioner v. Sunnen*, 333 U.S. 591 (1948), the Court considered whether a decree in a tax case should be given collateral estoppel effect when the decisional law had changed since the decree. Finding that under intervening modifications in the decisional law the original decree could no longer be sustained, the Court rejected the application of collateral estoppel:

> [A] subsequent . . . development in the controlling legal principles may make [a prior] determination obsolete or erroneous, at least for future purposes. If such a determination is then perpetuated . . . as to the taxpayer involved in the original litigation, *he is accorded a tax treatment different from that given to other taxpayers of the same class. As a result, there are inequalities in the administration of the revenue laws . . . [and] inequities among taxpayers.*

Id. at 599 (emphasis added).

The decision below thus trammels upon the important policy of grand jury secrecy while treating unfairly a single group of taxpayers. If the court below had reached the opposite result, however, the Internal Revenue Service would not have suffered a significant adverse effect. The Service could still obtain access to relevant evidence through the ample investigatory means at its disposal.[14] And if these means should prove inadequate in a specific instance, the Service may then be able to demonstrate a particularized need for disclosure of grand jury materials. In the absence of such a need, however, Rule 6(e) clearly forbids disclosure of grand jury materials to the Service.

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[14] *See, e.g.*, 26 U.S.C. § 7602 (1982) (conferring upon Service authority to summon witnesses and examine books and records).

II. IN RELYING ON THE FACT THAT SOME PERSONNEL HAVE HAD ACCESS TO THE GRAND JURY MATERIALS AS A BASIS FOR REFUSING TO VACATE PROSPECTIVELY THE PRIOR RULE 6(e) ORDER, THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S DECISION IN *SELLS*, THE NINTH CIRCUIT'S DECISION IN *SELLS II*, AND THE SECOND CIRCUIT'S DECISION IN *JOHN DOE, INC. I*

The court below rejected petitioners' claim that the Service's continuing access to grand jury materials after the announcement of *Sells* and *Baggot* constituted further "disclosure" that should be prohibited unless the Service could make the showing required by those decisions. It reasoned that because certain grand jury materials had previously been disclosed, the Service's continuing access to grand jury materials in the future would not constitute "disclosure" of such materials prohibited by Rule 6(e).

This conclusion is inconsistent with this Court's decision in *Sells*, and with the respective decisions of the Ninth and Second Circuits in *Sells II* and *John Doe, Inc. I*. *See* Pet. App. 8a (Butzner, J., dissenting). In *Sells*, this Court rejected the government's contention that the case was moot because the grand jury materials in question had already been disclosed to certain personnel within the Civil Division of the Justice Department. In so doing, the Court made clear that although there had been some disclosure of grand jury materials, the vital interest in grand jury secrecy would still be preserved by restricting further access to the materials to only those circumstances permitted by Rule 6(e).

> "By its terms the disclosure order grants access to all attorneys for the Civil Division, their paralegal and secretarial staff, and all other necessary assistants. Each day this order remains effective the veil of secrecy is lifted higher by disclosure to additional personnel and by the continued access of those to whom the materials have already been disclosed. We

> cannot restore the secrecy that has already been lost but we can grant partial relief by preventing further disclosure."

463 U.S. at 422-23 n.6 (quoting *In re Grand Jury Investigation No. 78-184 (Sells, Inc.)*, 642 F.2d 1184, 1188 (9th Cir. 1981), *aff'd sub nom. United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983)).

Similarly, in *Sells II*, the government argued that the case was mooted "by the release of the grand jury materials to the IRS agent and by his determination of the appellants' correct tax liability." 719 F.2d at 990. In vacating the Rule 6(e) order, the Ninth Circuit rejected this contention, recognizing that additional breaches of grand jury secrecy would otherwise take place as the tax proceeding advanced toward litigation.

> By its terms, the disclosure order contemplates increasingly broad distribution of materials as the stages of administrative and, potentially, judicial proceedings progress . . . . The district court's order explicitly authorizes disclosure to the extent necessary in each of these stages. Therefore, the circumstances presented here involve a court order authorizing a continued and increasingly wide breach of grand jury secrecy. This imparts life to the dispute. The appeal is not moot. We are not powerless to accord relief if, indeed, the order was erroneously entered.

Id. (citations omitted).

Finally, in *John Doe, Inc. I*, the Court of Appeals for the Second Circuit first concluded that a Rule 6(e) order issued to permit disclosure of grand jury materials to the Antitrust Division of the Justice Department for use in civil litigation must be vacated because the order was not based upon a showing of "particularized need" as required by *Sells*. Having reached that conclusion, the court then had before it the question whether the Antitrust Division attorneys who conducted the grand jury investi-

gation could continue to use grand jury materials, without a Rule 6(e) order, to litigate the civil case. Noting that the grand jury materials in question filled some 250,000 pages, the court recognized that "[c]ivil prosecution of the case would therefore invite [the Antitrust Division attorneys] to refer repeatedly to the documents and transcripts . . . ." 774 F.2d at 40. Based on this recognition, the court ruled that the attorneys' continuing access to the materials was equivalent to "disclosure" within the meaning of Rule 6(e). *Id.*

Turning next to the question whether a Rule 6(e) order was required for such access, the court took cognizance of the fact that the attorneys' continuing access to the materials would, in all likelihood, result in disclosure of the materials to additional Justice Department personnel. *Id.* at 42. For that reason, the court prohibited further access to or use of grand jury materials by the Antitrust Division in the pending civil action, unless the Division obtained a Rule 6(e) order based on an appropriate showing of "particularized need" for use of the material. *Id.*

By contrast, in holding that the Service's continuing access to grand jury materials does not violate Rule 6(e) because disclosure had previously taken place pursuant to the prior Rule 6(e) order, the decision below is squarely inconsistent with *Sells*, *Sells II*, and *John Doe, Inc. I*. As Judge Butzner stated in dissent:

> The government's continued access to the grand jury materials after a change in the applicable law constitutes disclosure that is subject to the requirements of *Sells* and *Baggot*.

Pet. App. 8a (citing *John Doe, Inc. I*, 774 F.2d at 40-42 and *Sells II*, 719 F.2d at 990-92).

The panel majority sought to distinguish *John Doe, Inc. I* on the ground that in the instant case the grand jury material was previously disclosed pursuant to a pre-

sumptively valid Rule 6(e) order, while in *John Doe, Inc. I*, the Second Circuit had found that the earlier Rule 6(e) order was invalid. Pet. App. 5a n.4. In so doing, however, the court below overlooked the fact that in *John Doe, Inc. I*, the Antitrust Division attorneys in question had previously had *lawful* access to the grand jury materials pursuant to Fed. R. Crim. P. 6(e)(3)(A) by virtue of their participation in the criminal grand jury investigation.

Thus, both *John Doe, Inc. I* and the decision below dealt with the question whether government personnel who previously had presumptively lawful access to grand jury materials could continue to have such access in situations in which Rule 6(e), as interpreted in this Court's decisions in *Sells* and *Baggot*, would prohibit such access. The court below answered that question in the affirmative, while the Second Circuit in *John Doe, Inc. I* answered it in the negative.[15]

In granting the United States' petition for certiorari in *John Doe, Inc. I, cert. granted sub nom. United States v. John Doe, Inc. I*, 54 U.S.L.W. 3777 (U.S. May 27, 1986) (No. 85-1613), this Court has apparently already determined that the question common to that case and this one is of sufficient importance to merit plenary con-

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[15] The decision of the Court of Appeals for the Eighth Circuit in *United States v. Archer-Daniels-Midland Co.*, 785 F.2d 206, *petition for cert. filed*, 54 U.S.L.W. 3763 (U.S. May 7, 1986) (No. 85-1840), is fully consistent with the position advanced by petitioners herein. There, the court of appeals held that Rule 6(e) does not require the Justice Department to obtain a court order in order to be able to assign to a civil antitrust investigation the same Department attorneys who worked on a criminal grand jury investigation of the same targets, where the attorneys will not use grand jury materials in preparing the civil investigation. In so doing, the court recognized that its case was distinguishable from *John Doe, Inc. I* (and therefore from the present case) "because it does not contain a clear showing of continued use of grand jury materials by [the] attorneys assigned to the civil litigation . . . ." 785 F.2d at 213 n.12.

sideration.[16] Petitioners respectfully submit that the instant petition should be granted and the case set down for argument concurrently with *John Doe, Inc. I*, or, alternatively, that the instant petition be held pending this Court's decision in *John Doe, Inc. I*.

CONCLUSION

For the reasons stated above, this petition for certiorari should be granted.

Respectfully submitted,

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[16] *See* Petition for Writ of Certiorari at I (presenting the question "[w]hether an attorney of the Antitrust Division of the Department of Justice who has properly had access to grand jury materials while conducting a criminal investigation may use the same materials in preparing for and litigating a related civil case without obtaining a disclosure order pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure.")

APPENDIX

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UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 85-1121

UNITED STATES OF AMERICA,
Appellee,

v.

(UNDER SEAL),
Appellant.

IN RE GRAND JURY 78-3 (JOHN DOE NO. 218), DR. MURDOCK HEAD, AIRLIE TRUST, AIRLIE FOUNDATION, and RAVEN'S HOLLOW, LTD.

Argued Oct. 7, 1985

Decided Feb. 7, 1986

Rehearing and Rehearing En Banc
Denied March 24, 1986

Before K.K. HALL and WILKINSON, Circuit Judges, and BUTZNER, Senior Circuit Judge.

K.K. HALL, Circuit Judge:

Dr. Murdock Head and several business entities controlled by him, Airlie Foundation, Airlie Trust, and

Raven's Hollow, Ltd., (the "taxpayers") appeal from the district court's order denying their motion to vacate a previous order which authorized disclosure of grand jury material to the Internal Revenue Service (the "IRS"). We affirm.

I.

In 1978, a federal grand jury began an investigation of the taxpayers. The grand jury issued numerous subpoenas for testimony and documents. In addition, documents were produced voluntarily by the taxpayers pursuant to an agreement with the government that the documents would be treated as if subpoenaed. The investigation resulted in a thirteen-count indictment against Dr. Head, who was subsequently convicted of conspiracy to commit the offenses of bribery and tax evasion as well as a substantive illegal gratuity offense.[1]

In connection with the trial of Dr. Head, the government, in November, 1979, filed a motion in district court under Fed. R. Crim. P. 6(e),[2] requesting permission to disclose to the IRS various grand jury materials gathered during the investigation of the taxpayers. The government sought the materials in order to determine whether the taxpayers had any civil tax liability and to determine whether Airlie Foundation's tax-exempt status should be revoked.

On December 4, 1979, the district court granted the government's motion. The government subsequently re-

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[1] Dr. Head's original conspiracy conviction was reversed by this Court in *United States v. Head*, 641 F.2d 174 (4th Cir. 1981). Upon retrial, Dr. Head was again convicted on the conspiracy count and also of the substantive illegal gratuity offense. That conviction was affirmed. *United States v. Head*, 697 F.2d 1200 (4th Cir. 1982).

[2] Rule 6(e)(3) provides, in pertinent part, that:

> (C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—
>
> (i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

quested clarification of the district court's order, because it did not clearly permit the disclosure of all of the materials requested. Accordingly, the district court issued an order permitting the disclosure of the books, records, and documents obtained by the grand jury; transcripts of the testimony of grand jury witnesses; and reports prepared by IRS agents which had been sought in the government's original motion.

Thereafter, the IRS assessed civil tax deficiencies against Dr. Head, Raven's Hollow, Ltd., and Airlie Trust. In September, 1980, the taxpayers petitioned the Tax Court for redetermination of those deficiencies. On December 15, 1980, Airlie Foundation (the "Foundation") was notified that administrative proceedings would be initiated by a request for technical advice from the National Office of the IRS to determine whether to revoke the Foundation's tax-exempt status retroactively to its inception.[3] In preparation for their Tax Court case and the administrative proceedings, the taxpayers were given access to all of the grand jury material.

On June 30, 1983, after the Tax Court and administrative proceedings had begun, the United States Supreme Court decided *United States v. Sells Engineering Co.*, 463 U.S. 418, 103 S.Ct. 3133, 77 L.Ed.2d 743 (1983), and *United States v. Baggot*, 463 U.S. 476, 103 S.Ct. 3164, 77 L.Ed.2d 785 (1983). Those decisions limited the disclosure of grand jury material for use in civil litigation, including civil tax audits. The Tax Court and ad-

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[3] A technical advice request is the means by which an IRS District Director may seek from the National Office of the IRS a determination of, *inter alia*, whether an organization is entitled to exempt status. *See* 26 C.F.R. § 601.201(n)(9)(iii)(a) (1984); Rev.Proc. 83-2. After the taxpayer is given an opportunity to respond to the request in writing, and an opportunity for a conference, the National Office issues a technical advice memorandum. This memorandum constitutes the IRS's determination of the legal issues regarding the exempt status of the organization.

ministrative proceedings in the instant case were held in abeyance while the IRS considered the impact of *Sells* and *Baggot*.

On September 11, 1984, the Tax Court held in *Kluger v. Commissioner*, 83 T.C. 309 (1984), that *Baggot* and *Sells* should not be applied retroactively, and it refused to suppress grand jury material obtained by the IRS under a Rule 6(e) order entered before *Sells* and *Baggot* were decided. Following the *Kluger* decision, the IRS began to prepare the instant Tax Court cases for trial and to review the technical advice request regarding the Foundation.

Subsequently, on December 18, 1984, the taxpayers filed a motion to vacate the district court's December 4, 1979, Rule 6(e) order. The district court found that the government had relied in good faith on the Rule 6(e) order, and that the IRS had been using the materials for over four years. The court concluded that *Sells* and *Baggot* should not be applied retroactively, and it denied the taxpayers' motion.

The taxpayers appeal.

II.

In *Sells*, the Supreme Court held that Rule 6(e) requires government attorneys other than prosecutors to make a showing of particularized need for grand jury material before any disclosure will be permitted for use in civil litiagtion. 103 S.Ct. at 3147-48. The Supreme Court held in *Baggot* that the IRS is not entitled to disclosure of grand jury material for use in civil tax audits. 103 S.Ct. at 3167. The Court in *Baggot* reasoned that:

> [I]t is not enough to show that some litigation may emerge from the matter in which the material is to be used, or even that litigation is factually likely to emerge. The focus is on the *actual use* to be made of the material. If the primary purpose of disclosure is

> not to assist in preparation or conduct of a judicial proceeding, disclosure under [Rule 6(e)(3)](C)(i) is not permitted.

Id.

On appeal in this case, the taxpayers initially assert that "disclosure" and "use" as synonymous, and that each time grand jury material is "used" it is "disclosed." They contend that because the government has not made a showing of particularized need as required under *Sells*, the government's post-*Sells* use of the grand jury material, and any such future use, violates Rule 6(e). The taxpayers also claim that because the purpose of the pending proceeding against Airlie Foundation is to determine its tax-exempt status in an administrative, as opposed to a judicial, context, further use of the disclosed material would violate Rule 6(e). On these bases, appellants seek an order restraining such future use and finding that the use of grand jury materials which has occurred since *Sells* and *Baggot* violated Rule 6(e). The taxpayers further argue that whether *Sells* and *Baggot* are to be applied retroactively is irrelevant. However, appellants maintain that if retroactivity is relevant, *Sells* and *Baggot* should be applied retroactively. We conclude that the Rule 6(e) order here was valid and that *Sells* and *Baggot* do not have retroactive application in this case. In light of this holding, we do not address the taxpayers' first claim that use is synonymous with disclosure.[4] We disagree with each of appellant's remaining contentions.

We find that the Supreme Court's decisions in *Sells* and *Baggot* did not invalidate the district court's Rule

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[4] Appellants' reliance upon *In Re Grand Jury Investigation*, 774 F.2d 34 (2d Cir. 1985), is misplaced. In that case, the Second Circuit, having found the Rule 6(e) order itself to be invalid, stated that continued access to the grand jury material constituted "disclosure." Such is not the situation in the instant case. Here, the grand jury material was disclosed pursuant to a valid Rule 6(e) order. Thus, we need not reach the issue of whether continued use of that material constitutes further disclosure.

6(e) order in this case. The Supreme Court did not hold, as the taxpayers argue, that any use of the grand jury material after the date *Sells* and *Baggot* were decided is *per se* unlawful. Rather, the Supreme Court addressed only the standards that a court must follow in authorizing, in the first instance, disclosures of grand jury materials under Rule 6(e). *Sells* and *Baggot* affirmed lower court refusals to authorize disclosures under Rule 6(e), but neither decision purported to invalidate all outstanding Rule 6(e) orders that were inconsistent with the holdings they announced.

The grand jury material at issue here was disclosed to the IRS pursuant to a valid pre-*Baggot* and pre-*Sells* Rule 6(e) order. Thus, unless *Baggot* and *Sells* apply retroactively to invalidate that order, the continued use of that grand jury material does not violate Rule 6(e). We find that retroactive application of *Sells* and *Baggot* in this case is not appropriate.

In *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed. 2d 296 (1971), the Supreme Court announced a three-part test for determining whether a decision should be given retroactive effect. Under that test, the factors to be considered are: (1) whether the decision establishes a new principle of law; (2) whether retroactive application will further or retard the rule in question; and (3) whether retroactive application will be inequitable. 404 U.S. at 106-07, 92 S.Ct. at 355.

Applying the first prong of the *Chevron* test, we find that before the Supreme Court's decision in *Sells*, there was no requirement that a showing of particularized need be made in order to disclose grand jury material to the IRS for civil use pursuant to Rule 6(e). Nor was it a clear rule of law that grand jury material could not be disclosed for use in civil tax audits before the Supreme Court's decision in *Baggot*. For example, the Eighth Circuit had held that disclosure of grand jury material to the IRS for use in civil tax audits was proper under

Rule 6(e). *In Re Judge Elmo B. Hunter's Special Grand Jury*, 667 F.2d 724 (8th Cir.1981). The Seventh Circuit, over a vigorous dissent, had held otherwise. *In Re Special February, 1975 Grand Jury (Baggot)*, 662 F.2d 1232 (7th Cir.1981). Under these facts, we find that *Sells* and *Baggot* established new rules regarding disclosures under Rule 6(e), and that under the first factor of the *Chevron* test retroactivity is not appropriate. *See Brown v. Mitchell*, 598 F.2d 835, 837-39 (4th Cir.1979), *cert. denied*, 449 U.S. 1123, 101 S.Ct. 939, 67 L.Ed.2d 109 (1981).

Likewise, we conclude that the second and third *Chevron* factors weigh against retroactive application of *Sells* and *Baggot*. The purpose of Rule 6(e) is to protect the secrecy of grand jury proceedings. It was not intended to cloak individuals under investigation in a protective mantle of concealment. In this case, much of the grand jury material has already been disclosed to the public via the criminal case, and all of it has been disclosed to the taxpayers in preparation for their Tax Court case and the administrative proceedings. Where full disclosure, as here, has occurred, retroactive application of *Sells* and *Baggot* would not further the grand jury secrecy interests of Rule 6(e). In addition, retroactive application could impose an unjustified shield to appellants' tax liabilities—a result which would be clearly inequitable. Therefore, we hold that *Sells* and *Baggot* do not apply retroactively so as to prohibit the use of grand jury material which was fully disclosed pursuant to a valid Rule 6(e) order before those cases were decided.

On the basis of the foregoing, the judgment of the district court is affirmed.

AFFIRMED.

BUTZNER, Senior Circuit Judge, dissenting:

Although *United States v. Sells*, 463 U.S. 418, 103 S.Ct. 3133, 77 L.Ed.2d 743 (1983), and *United States v. Bag-*

got, 463 U.S. 476, 103 S.Ct. 3164, 77 L.Ed.2d 785 (1983), do not retroactively invalidate a prior disclosure order entered pursuant to Fed.R.Crim.P. 6(e), the government is not entitled to continued access to the grand jury materials after the Supreme Court's decisions in *Sells* and *Baggot* without showing a particularized need for the material. *See Thorpe v. Housing Authority*, 393 U.S. 268, 281, 89 S.Ct. 518, 525, 21 L.Ed.2d 474 (1968) (an appellate court must apply the law in effect at the time it renders its decision).

The government's continued access to the grand jury materials violates the policy of protecting grand jury secrecy acknowledged by the Supreme Court in *Sells*, 103 S.Ct. at 3138 n. 6:

> Each day this order remains effective the veil of secrecy is lifted higher by disclosure to additional personnel and by the continued access of those to whom the materials have already been disclosed. We cannot restore the secrecy that has already been lost but we can grant partial relief by preventing further disclosure. *Quoting In re Grand Jury Investigation (Sells, Inc.)*, 642 F.2d 1184, 1188 (9th Cir. 1981).

The government's continued access to the grand jury materials after a change in the applicable law constitutes disclosure that is subject to the requirements of *Sells* and *Baggot*. *In re Grand Jury Investigation*, 774 F.2d 34, 40-42 (2d Cir.1985). *See also In re Sells*, 719 F.2d 985, 990-92 (9th Cir.1983).

It is prospective application of *Sells* and *Baggot* to disclosures occurring after the cases were decided that entitles the appellants to relief. Instead of affirming the district court, I would remand the case with directions to prohibit further disclosure of the grand jury material in pending civil and administrative proceedings unless the government shows a particularized need.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1121

UNITED STATES OF AMERICA,
Appellee,

versus

(UNDER SEAL),
Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria
James C. Cacheris, District Judge

[Filed Mar. 24, 1986]

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Hall, with the concurrence of Judge Wilkinson. Judge Butzner dissents.

For the Court,

/s/ John M. Greacen
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Criminal No. 79-115-A

IN RE: GRAND JURY 78-3 (JOHN DOE NO. 218)

DR. MURDOCK HEAD, AIRLIE TRUST,
AIRLIE FOUNDATION, AND RAVEN'S HOLLOW, LTD.,
Movants.

The above-entitled matter came on to be heard in the United States District Court, Alexandria, Virginia, commencing at 9:00 a.m. on February 1, 1985.

Before: HONORABLE JAMES C. CACHERIS, Presiding United States District Judge

APPEARANCES:

For the United States:
KENNETH MELSON, ESQ.
J. BRIAN FERREL, ESQ.

For the Movants:

FRANK DUNHAM, JR., ESQ.
MITCHELL ROGOVIN, ESQ.

* * * *

[33] THE COURT: Okay. Let me just address the issues. What the case is before us is on the movants to revoke the order of December 4, 1979, of Judge Lewis' memorandum opinion on Rule 6(e). I'll just touch briefly on the jurisdictional issue, does the court have jurisdiction. Well, I think there's two ways you can go on that. While Sells discusses mootness in the footnote number six, it also indicates that the controversy in that case was still

a live one and as such the court had jurisdiction over it. I think that may be sufficient.

Second, you could go the way the Northern District of California went and just consider this as an evidentiary matter, and something for the court to rule on as an evidentiary. In any event, I'm going to come to—therefore the court would have jurisdiction. I will come down to what I think is the main issue as to whether this is Sells and Baggot prospective or retroactive. I conclude that they're prospective and not retroactive.

If you apply the Chevron test to it, does it overrule clear law? I think it does. I think it overrules some of the [34] precedents of the Fourth Circuit.

The purpose of the rule is to maintain secrecy. A little bit of that is gone at this point because matters have been out somewhat in the public domain almost for five years now or a little longer than five years.

It's also, for the court, it's not something anybody could have foreseen that the Sells and Baggot cases would come down the way they did. Also the government has had this material for five years. Appears to be a number of cases that are involved. I.R.S. and counsel argues that something like 785 cases, what have you.

But in any event, I'm deciding this one. I think at this point the equities favor the government. It's a good faith reliance on their part on the order of December 4, 1979, that was entered by this court. So I think that the Sells and Baggot cases should be applied prospectively and not retroactively and I will deny the Movants' request at this time to vacate the order of December 4, 1979.

Okay. I'll go ahead and enter an appropriate order on that basis and let you go ahead and take it up.

MR. ROGOVIN: Your Honor, with respect to the prospective application, we were arguing—I'm not sure where we stand as to—take the exempt organization branch.

THE COURT: Counsel didn't touch on that. How about as to the exempt organization branch, Mr. Ferrel?

[35] MR. FERREL: Your Honor, if Baggot and Sells are only going to apply prospectively to the exempt or-

ganization branch, we can continue to use this information and the Tax Court people can continue to use it.

THE COURT: Mr. Rogovin, any comment on that?

MR. ROGOVIN: Yes, sir, Your Honor. The materials are currently being disclosed and if the Sells opinion means anything about the continued disclosure, it means that these materials in a prospective fashion cannot be continued to be used in this fashion. If the government wants to apply for a 6(e) order with respect to its use, they would presumably be blocked by Baggot.

THE COURT: Mr. Ferrel, do you want to use it in the future? The government want to use it in the future?

MR. FERREL: Yes, Your Honor, of course.

THE COURT: I'm going to allow them to use it in the future. I'll deny your motion. I'll let you go ahead and take this up on this point. I'll recess until ten o'clock. Okay.

(at 9:55 a.m. the above matter was concluded.)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Criminal No. 79-00115-A
(Dr. Murdock Head)

IN RE GRAND JURY 78-3 (JOHN DOE NO. 218)

DR. MURDOCK HEAD, AIRLIE TRUST,
AIRLIE FOUNDATION, AND RAVEN'S HOLLOW, LTD.,
Movants

ORDER

For reasons stated in open Court, it is accordingly

ORDERED:

(1) that movants' Motion to Vacate This Court's Order of December 4, 1979, is DENIED;

(2) that movants' oral Motion for a Temporary Restraining Order Pending Appeal is DENIED;

(3) that the Clerk shall forward certified copies of this Order to all counsel of record.

/s/ James C. Cacheris
United States District Judge

February 1, 1985
Alexandria, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Criminal No. 79-00115-A

IN RE GRAND JURY 78-3 (JOHN DOE NO. 218)

v.

DR. MURDOCK HEAD, AIRLIE TRUST,
AIRLIE FOUNDATION, AND RAVEN'S HOLLOW, LTD.,
Movants

[Filed Feb. 15, 1985]

ORDER

For reasons stated in open Court, it is accordingly

ORDERED:

(1) that the Motion of Airlie Foundation for Injunction Pending Appeal filed on February 13, 1985, is DENIED;

(2) that the Clerk shall forward certified copies of this Order to all counsel of record.

/s/ James C. Cacheris
United States District Judge

Alexandria, Virginia
DATE: Feb. 15, 1985

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1121

UNITED STATES OF AMERICA,
Appellee,

versus

UNDER SEAL,
Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria
James C. Cacheris, District Judge

[Filed Mar. 18, 1985]

Upon consideration of appellant's motion for injunction pending appeal, appellant's motion for expedited consideration of appeal, the government's response in opposition to motion for injunction pending appeal, and appellant's reply brief in support of motion for injunction pending appeal,

IT IS ORDERED that the motion for injunction pending appeal and the motion for expedited consideration of the appeal are hereby denied.

Entered at the direction of Chief Judge Winter with the concurrence of Judge Phillips. Judge Hall dissents on both the denial of the motion for injunction pending appeal and the denial of motion for expedited consideration of appeal.

For the Court,

/s/ John M. Greacen
Clerk

Supreme Court, U.S.
FILED
OCT 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-267

In the Supreme Court of the United States

OCTOBER TERM, 1986

RAVEN'S HOLLOW, LTD., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-267

RAVEN'S HOLLOW, LTD., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners seek review of the court of appeals' refusal to vacate a district court order entered in 1979 pursuant to Fed. R. Crim. P. 6(e), which authorized the disclosure of grand jury materials to the Internal Revenue Service for use in determining and litigating petitioners' civil tax liabilities.

1. a. In 1978, a federal grand jury sitting in the Eastern District of Virginia began an investigation of petitioners. During that investigation, petitioners and related persons and entities produced voluminous financial records for examination by the grand jury (C.A. App. 31-32). Various persons testified before the grand jury during the course of the investigation.

Petitioner Head was indicted, was tried twice, and was ultimately convicted on one count of conspiracy to commit bribery and tax evasion and on one count of making an illegal gratuity.[1] Pet. App. 2a, 7a.

At the conclusion of the first trial in November 1979, the government sought and obtained from the district court an order, pursuant to Fed. R. Crim. P. 6(e), authorizing the disclosure of grand jury materials to the Internal Revenue Service (IRS) to determine whether petitioners owed additional taxes and whether petitioner Airlie Foundation was entitled to retain its tax-exempt status (C.A. App. 35-36, 40-41).[2] The government's application for the Rule 6(e) order met the standards then prevailing in the Fourth Circuit for the disclosure of grand jury materials to the IRS (Pet. App. 6a).[3] Review of petitioner's civil tax deficiencies is currently pending before the Tax Court, and petitioner Airlie Foundation's tax exempt status is still under consideration by the IRS.

Counsel for petitioners have to the best of our knowledge received access to all of the documents subpoenaed by, and all of the testimony before, the grand jury that was disclosed to the IRS and that is

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[1] See *United States* v. *Head*, 641 F.2d 174 (4th Cir. 1981); *United States* v. *Head*, 697 F.2d 1200 (4th Cir. 1982), cert. denied, 462 U.S. 1132 (1983).

[2] The district court issued an original order (C.A. App. 35-36) and an order on the government's motion for clarification (*id.* at 40-41). Although the government filed both motions *ex parte*, petitioners were aware of and opposed the government's initial motion (*id.* at 134-136).

[3] See *In re Grand Jury Subpoenas, April 1978, at Baltimore*, 581 F.2d 1103 (4th Cir. 1978), cert. denied, 440 U.S. 971 (1979); *In re December 1974 Term Grand Jury Investigation*, 449 F. Supp. 743 (D. Md. 1978).

relevant to these proceedings. Portions of these materials were made available to counsel for petitioner Head in connection with his criminal trials, and substantial amounts of grand jury materials were introduced into evidence at those trials. Pet. App. 2a, 7a; C.A. App. 23-30. Counsel for petitioners were also given access to grand jury materials in the IRS' possession in connection with the Tax Court proceedings (see C.A. App. 42-49, 58-59, 84-86, 89-101, 165-180, 190-194, 197-198, 211).[4]

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[4] Before trial in the criminal proceedings against petitioner Head, the government disclosed: (1) the documents the government intended to introduce in its case-in-chief; (2) the exhibits supporting the charges in the indictment; (3) an inventory of records and documents obtained by the government prior to the issuance of grand jury subpoenas; (4) all grand jury transcripts of 13 government witnesses, and portions of the transcripts of another witness; (5) trial transcripts of seven witnesses and the congressional testimony of another witness; and (6) all of the Federal Bureau of Investigation (FBI) and IRS witness interview reports relevant to the charges in the indictment. C.A. App. 23-26. Numerous grand jury materials were thereafter introduced at petitioner Head's trials.

In 1981, petitioners filed a motion pursuant to Rule 6(e) seeking the disclosure of: (1) all documents submitted to and testimony before the grand jury; (2) a complete list of grand jury witnesses; (3) witness interview reports prepared by the FBI that were submitted to the grand jury; (4) the summary report and appendices prepared by an IRS agent and submitted to the grand jury; and (5) witness interview reports prepared by the IRS before and during the grand jury investigation. See C.A. App. 44, 57-58. Petitioners' motion was granted in part and denied in part. Petitioners were granted access to all books and records that they had submitted to the grand jury (*id.* at 59; see also *id.* at 84-101). Petitioners were granted access to the books and records of third parties insofar as the IRS relied on these items in the civil or administrative proceedings; otherwise, petitioners' motion for disclosure

b. Almost five years after entry of the 1979 order, in December 1984, petitioners moved to vacate the Rule 6(e) order and to prohibit the IRS from using any grand jury materials obtained pursuant to the order (C.A. App. 102-110). Relying on *United States* v. *Baggot*, 463 U.S. 476 (1983) (Rule 6(e) does not authorize disclosure of grand jury material to the IRS to determine tax liabilities), and *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983) (the government must establish a particularized need for grand jury materials to obtain disclosure under Rule 6(e) for use in a civil suit), petitioners argued that the district court's 1979 Rule 6(e) order should be

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of these documents was denied (*id.* at 59). Petitioners' motion for disclosure of the FBI and IRS witness interview reports was denied on the ground that these items were not grand jury materials (*ibid.*). The government voluntarily disclosed numerous IRS witness interview reports, however (*id.* at 46), and, as noted above, the government had disclosed the FBI and IRS witness interview reports to petitioner Head during his criminal prosecution (*id.* at 25, 26). Although petitioners' motion was denied in part, we are informed by the United States Attorney's Office and the IRS's Chief Counsel's Office that all grand jury materials that were relevant, respectively, to petitioner Head's criminal prosecution or to the ongoing civil or administrative proceedings have been disclosed to petitioners.

Petitioners' contention (Pet. 7 n.6) that there is no support in the record for the court of appeals' statement (Pet. App. 7a) that all of the grand jury materials possessed by the IRS have been disclosed to the public or to petitioners, puts the matter the wrong way around. It is clear that an enormous quantity of grand jury materials has been so disclosed. Petitioners have not identified—and we are not aware of—any materials they have not obtained that are relevant to the ongoing tax proceedings.

revoked and the government should be forbidden from using any of the materials it had obtained.

The district court denied petitioner's motion (C.A. App. 120). The court found that "the equities favor[ed] the government," which had relied in good faith on the 1979 order and had used the grand jury materials for nearly five years (Pet. App. 11a; C.A. App. 126). The court also concluded that *Sells* and *Baggot* should not be given retroactive effect (Pet. App. 12a).

c. The court of appeals, by a divided vote, affirmed (Pet. App. 1a-8a; 783 F.2d 450). The panel unanimously agreed that *Sells* and *Baggot* should not be applied retroactively (*id.* at 6a-7a; *id.* at 7a-8a (Butzner, J., dissenting)). The panel majority concluded that modification of the 1979 order was unnecessary, because the order was valid when it was entered (*id.* at 6a-7a). The dissenting judge believed that the government should be required to meet the standards imposed by *Baggot* and *Sells* in order to make future use of the grand jury materials (*id.* at 8a).

2. The question presented by this case is one of small and diminishing importance. Moreover, it is a question that turns on the facts and circumstances of each case—"the equities"—and which was correctly answered in this case. Further review is therefore not warranted.

a. Petitioners do not contend that the 1979 order was not sought and issued in good faith based on then prevailing standards and observed in good faith for nearly five years thereafter. And petitioners do not here challenge the court of appeals' ruling that *Sells* and *Baggot* do not apply retroactively. Their sole contention is that pre-*Sells* and *Baggot* Rule 6(e)

orders should now be prospectively vacated unless the orders could be issued today under the rules announced in those cases. But even if that contention were susceptible to a single yes-or-no answer applicable to every case, it would apply only to a small, closed, and diminishing category of cases involving Rule 6(e) orders entered before the 1983 decisions in *Sells* and *Baggot* that remain partially executory.[5] The contention is therefore at best of limited significance that does not warrant review by this Court.

b. A Rule 6(e) order that was properly issued and subsequently relied on in preparing a civil case should be vacated only when there has been a showing—not made here—that a failure to vacate the order would be inequitable. *System Federation No. 91* v. *Wright*, 364 U.S. 642 (1961), does not, as petitioners suggest, stand for the stunning proposition that every valid executory court order must be vacated or modified whenever there is a change in the law that would preclude its issuance as an original matter. To the contrary, the Court carefully noted that "[a] balance must be struck between the policies of *res judicata* and the right of the court to apply modified measures to changed circumstances" (*id.* at 647-648) and that because there is "such a balance of imponderables there must be wide discretion in the District Court" (*id.* at 648). Modification is required only "when a change in law or facts has made inequitable what was once equitable" (*id.* at 652). In *Wright*, a consent decree prohibiting certain private conduct that was unlawful when the decree was en-

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[5] A final judgment in a civil case cannot be retrospectively challenged on the basis of a subsequent decision. *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371 (1940).

tered was ordered modified when Congress legalized the conduct in question. Continued application of the decree would have imposed a no longer appropriate burden on the parties subject to it.

c. The decisions in *Sells* and *Baggot* do not require the prospective vacation of the Rule 6(e) order entered in this case either to vindicate the public policies underlying those decisions or to eliminate any actual unfairness to petitioners.

First, as noted, the materials in question were disclosed to the IRS pursuant to a disclosure order that petitioners concede was valid when entered and was not retroactively invalidated by *Sells* or *Baggot*. There is no suggestion of improper government conduct that needs to be remedied. Cf. *Gluck* v. *United States*, 771 F.2d 750, 757-758 (3d Cir. 1985) (upholding summons issued in good-faith reliance on a validly entered pre-*Baggot* Rule 6(e) disclosure order); *United States* v. *Leon*, 468 U.S. 897 (1984). To the contrary, the only effect of vacating the order here would be to delay and complicate tax proceedings prepared in good faith over a five-year period while the courts below sort out the effect of vacation of the order.[6]

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[6] This case does not, in its current posture, present the question involved in *United States* v. *John Doe, Inc. I*, cert. granted, No. 85-1613 (May 27, 1986): whether continued use of grand jury materials by the same personnel constitutes a "disclosure" of those materials requiring a Rule 6(e) order. If the Rule 6(e) order were to be vacated in this case, we believe it very possible that the courts below would eventually conclude that such vacation has no effect on continued use of the materials, because they are in fact all public (see page 9 note 8, *infra*), or because no disclosure is involved. Substantial proceedings would obviously be necessary before such a determination could be made.

Second, prospective vacation of pre-1983 Rule 6(e) orders is obviously not necessary to protect the public policies underlying the decision in *Sells*: enhancing the willingness of grand jury witnesses to come forward and testify fully and candidly, and preventing the improper use of the grand jury for civil discovery purposes. See *Sells*, 463 U.S. at 432-433. Those interests are safeguarded by applying the standards adopted in *Sells* and *Baggot* to future disclosure applications.[7]

Third, there is no need to vacate the 1979 order to avoid prejudice to petitioners. Through discovery in petitioner Head's criminal prosecution or during the ongoing civil proceedings, petitioners obtained all relevant grand jury materials that were disclosed to the IRS under the 1979 Rule 6(e) order. The government therefore does not have " 'exclusive access to a storehouse of relevant fact' " (*Sells*, 463 U.S. at 434 (citation omitted)). Petitioners will be in the same position as the government if the 1979 order is left in place.

Finally, vacating the 1979 disclosure order could significantly prejudice the government's opportunity to complete the on-going civil and administrative proceedings. The government reasonably relied on these materials in preparing for and developing those proceedings. Vacating the 1979 Rule 6(e) order would,

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[7] Indeed, since petitioners obtained the grand jury materials (see pages 3-4 note 4, *supra*), they are in no position to champion the public interest in secrecy at this late date in this proceeding. *Raphan* v. *United States*, 759 F.2d 879, 887 (Fed. Cir. 1985), cert. denied, No. 85-11 (Oct. 7, 1985); cf. *Davis* v. *Wakelee*, 156 U.S. 680, 689 (1895) (parties should not be permitted to take inconsistent positions in the same case).

at a minimum, force the government to establish its right to use the materials without a Rule 6(e) order[8] or to reacquire these materials through civil discovery, under the IRS's subpoena power, or through a new Rule 6(e) order. At worst, the government could be denied the opportunity to obtain these materials at all, on the ground that the IRS's efforts to reac-

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[8] In fact, we believe the courts would eventually rule that the government (and the petitioners) may now use any of the materials in question without a Rule 6(e) order because they have properly lost their confidentiality. All grand jury materials introduced into evidence at trial are now judicial records and are not protected by Rule 6(e). *United States* v. *Manglitz*, 773 F.2d 1463, 1467-1468 (4th Cir. 1985) (*Sells* does not require a district court to seal the record of a guilty plea proceeding because grand jury material is introduced absent proof that the government has sought to manipulate the proceeding to reveal grand jury materials); see, *e.g.*, *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589, 597-599 (1978) (common law grants a right of access to judicial records); *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 491-497 (1975) (First Amendment right to publish information lawfully acquired during court proceedings); see generally *United States* v. *Manglitz*, 590 F. Supp. 177, 178-179 (D. Md. 1984), aff'd, 773 F.2d 1463 (4th Cir. 1985) (prosecution does not need a Rule 6(e) order to introduce grand jury materials at trial) (collecting authorities). Similarly, no limitation was placed on the use that petitioners could make of the materials disclosed to them under their Rule 6(e) request or in discovery in petitioner Head's criminal trials (see C.A. App. 204). (In fact, certain grand jury materials disclosed to petitioner Head during his criminal prosecution were apparently revealed by him to the media, see C.A. App. 137-138.) There is, accordingly, no longer any secrecy interest in those materials that would be protected by Rule 6(e). See Fed. R. Crim. P. 6(e)(3)(C) (district court may impose conditions on disclosure of grand jury materials); cf. *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20 (1984) (courts may limit the public disclosure of information obtained in pretrial discovery).

quire these materials are "tainted" by the knowledge it obtained from its current use of them. Petitioners have offered no reason why they should be allowed to obtain such an inequitable litigating advantage in these proceedings.[9]

In sum, in these circumstances it would be a decision to revoke the 1979 Rule 6(e) order, not the district court's ruling below, that would serve as " 'an instrument of wrong' " (*System Federation No. 91* v. *Wright*, 364 U.S. at 647 (citation omitted)). The district court therefore did not err in refusing to vacate the 1979 Rule 6(e) order.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

OCTOBER 1986

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[9] The decision below does not conflict with *In re Sells*, 719 F.2d 985 (9th Cir. 1983) (*Sells II*), upon which petitioners rely. Unlike this case, *Sells II* involved a direct appeal from a Rule 6(e) order, entered before *Baggot* was decided, that was held on appeal until that decision was announced. Applying the rule that an appellate court must apply existing law (*e.g.*, *Thorpe* v. *Housing Authority*, 393 U.S. 268, 281-283 (1969)), the court of appeals held that the Rule 6(e) order must be set aside under *Baggot*. The court also concluded that the application of *Baggot* to that order would not result in a "manifest injustice" (719 F.2d at 990; see *id.* at 990 & n.3). For the reasons discussed in the text, the equitable considerations in this case are quite different.

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No. 86-267

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

RAVEN'S HOLLOW, LTD., AIRLIE FOUNDATION, AIRLIE TRUST AND MURDOCK HEAD,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITIONERS' REPLY BRIEF

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Federal Rules of Criminal Procedure

Fed. R. Crim. P. 6(e) ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-267

RAVEN'S HOLLOW, LTD., AIRLIE FOUNDATION, AIRLIE TRUST AND MURDOCK HEAD,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY BRIEF

In its Memorandum in Opposition ("Mem."), respondent raises a number of novel arguments, none of which effectively refutes petitioners' contention that the decision below is squarely in conflict with decisions of other courts of appeals regarding the effect of this Court's decisions in *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983) (*"Sells"*), and *United States* v. *Baggot*, 463 U.S. 476 (1983) (*"Baggot"*), on previously entered orders authorizing disclosure of grand jury materials pur-

suant to Fed. R. Crim. P. 6(e) ("Rule 6(e)"), and with decisions of this Court regarding the impact of an intervening change in the law on an executory order.

1. That certain of the grand jury materials at issue may have been disclosed to petitioners pursuant to the Federal Rules of Criminal Procedure in connection with petitioner Head's criminal trials and the pending tax proceedings is of scant relevance to the issues presented here. The question presented here is not whether petitioners may have access to the grand jury materials. Rather, the Petition requests the Court to determine whether grand jury materials may continue to be disclosed to the Internal Revenue Service pursuant to a Rule 6(e) order entered without the showing of "particularized need" for the materials for use "preliminarily to or in connection with a judicial proceeding" required under *Sells* and *Baggot*.

As this Court held in *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958), the mere fact that certain grand jury materials may have been disclosed to one party in a civil proceeding does not establish a "particularized need" justifying disclosure to the other party. *Id.* at 683. *See Texas v. United States Steel Corp.*, 546 F.2d 626, 629-30 (5th Cir.), *cert. denied*, 434 U.S. 889 (1977) (holding that fact that defendants in a civil action had previously received certain grand jury materials in connection with prior criminal proceedings did not give rise to particularized need on part of civil plaintiff for such materials); *Grumman Aerospace Corp. v. Titanium Metals Corp. of America*, 554 F. Supp. 771, 775 (E.D.N.Y. 1982) (holding that "[a]ccess by the government as a civil litigant to grand jury materials does not mandate disclosure of those materials to other private parties who are pursuing similar claims"). Because respondent has failed to make the showings required under *Sells* and *Baggot*, continuing disclosure of grand jury materials to the Service is barred under those decisions.

2. This case in its present posture *does* present the same question raised in *In re Grand Jury Investigation* (*John Does I-V v. United States*), 774 F.2d 34 (2d Cir. 1985), *cert. granted sub nom. United States v. John Doe, Inc. I*, 54 U.S.L.W. 3777 (U.S. May 27, 1986) (No. 85-1613) ("*John Doe, Inc. I*"): whether continued access by government personnel to grand jury materials constitutes "disclosure" requiring a Rule 6(e) order. In its argument to the contrary (Mem. at 7 n. 6), respondent conveniently ignores the fact that, as Judge Butzner recognized in dissent, the decision below rests on the very premise rejected by the court of appeals in *John Doe, Inc. I*—that because the grand jury materials in question were previously disclosed to government personnel, continuing access by such personnel to the materials does not constitute disclosure requiring a 6(e) order. Pet. App. 7a-8a. Thus, resolution by this Court of the question presented in *John Doe, Inc. I* may well determine the outcome of this case. In these circumstances, petitioners submit that this case should be set down for argument concurrently with *John Doe, Inc. I*, or, at a minimum, that the instant Petition should be held pending this Court's decision in that case.

3. Respondent, not petitioners, has distorted this Court's holding in *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961). While the Court made clear in that case that a district court must have "wide discretion" in determining whether to modify an executory order in light of a change in circumstances, it recognized that "discretion is never without limits and these limits are often far clearer to the reviewing court when the new circumstances involve a change in law rather than facts." *Id.* at 648. Those limits were breached, the Court held, when the district court refused to vacate an executory order that prohibited conduct made lawful by an intervening statutory enactment. *Id.* As the Court

later recognized in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984), *System Federation* thus stands for the proposition "that when a change in the law brought the terms of a decree into conflict with the statute pursuant to which the decree was entered, the decree *should* be modified." 467 U.S. at 576 n. 9 (emphasis added).

While a weighing of the equities is ordinarily appropriate in determining whether to modify an executory order, *System Federation* thus holds that it is *inherently* inequitable to fail to vacate an order prohibiting a party from engaging in conduct made lawful by a later-enacted pronouncement. Similarly, the principle articulated in *System Federation* and *Stotts* requires a court to vacate an executory order when a subsequent decision makes clear that the order authorizes conduct prohibited by law. The lower court's refusal to vacate its prior Rule 6(e) order is flatly inconsistent with that principle, and with *System Federation* and *Stotts*.

4. The difference between the procedural posture of this case and *In re Sells*, 719 F.2d 985 (9th Cir. 1983) (*"Sells II"*), does not vitiate the conflict between the two decisions. Both courts addressed the question whether pre-*Sells* and *Baggot* Rule 6(e) orders issued without the showings required under those decisions should be vacated so as to prohibit further disclosure of grand jury materials. On direct appeal from such an order in *Sells II*, the Ninth Circuit answered that question in the affirmative; here, on appeal from the denial of a motion to vacate the order, the court below answered it in the negative. Because, for the reasons set forth above and at pp. 13-17 of the Petition, under *System Federation* and *Stotts* the district court was *required* to grant petitioners' motion to vacate the prior Rule 6(e) order following the announcement of *Sells* and *Baggot*, there is no justification for resolving the instant case differently from *Sells II*.

5. It would not, as respondent contends, be inequitable to vacate the prior Rule 6(e) order. Doing so would simply require the Internal Revenue Service to demonstrate a "particularized need" for the grand jury materials for use "preliminarily to or in connection with a judicial proceeding" in order to obtain disclosure. Under *Sells* and *Baggot*, that is what the law requires. Moreover, as respondent points out, if the prior Rule 6(e) order is vacated, the Service may seek to establish that it is entitled to use the materials without a Rule 6(e) order, or to acquire whatever materials it may need through the investigatory tools lawfully at its disposal. Mem. at 9.

By contrast, the inequity occasioned by the decision below is considerable. Under *Sells* and *Baggot*, Rule 6(e) forbids the Service to have access to grand jury materials for use in administrative proceedings under any circumstances, and bars access to such materials for use in connection with Tax Court proceedings without a showing of "particularized need." Yet the decision below permits the Service to have such access in the petitioners' proceedings, because of the fortuity of the timing of the Rule 6(e) order. In these circumstances, plenary consideration is merited to correct this unfairness.*

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* Finally, before this Court, respondent has taken the position that the questions presented by this case occur in but a small number of cases. Intriguingly, in seeking to convince the courts below that *Sells* and *Baggot* should not be applied to bar further disclosure of grand jury materials after those decisions were announced, respondent took the view in the court of appeals that ruling in petitioners' favor would cause the courts "to be faced with a multitude of suits" presenting the question, Brief for the Appellee at 42, *United States v. (Under Seal)*, 783 F.2d 450 (4th Cir. 1986); and in the district court, respondent estimated that there were "thousands" of cases dealing with the issues raised by petitioners. Memorandum in Opposition at 45, *In re Grand Jury 78-3 (John Doe No. 218)*, Cr. No. 79-115-A (E.D. Va. Feb. 1, 1985). Petitioners submit that the Petition presents questions of considerable importance, questions which have arisen and are likely to arise

For the reasons stated above and in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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in other cases. *See, e.g., In re Grand Jury Proceedings (Kluger)*, 631 F. Supp. 1542 (E.D.N.Y. 1986), *remanded mem.*, No. 86-6143 (2d Cir. Sept. 26, 1986) (discussed at Pet. 12-13 n.8).

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No. 86-267

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Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Pursuant to Supreme Court Rule 22.6, Petitioners submit this supplemental brief to call to the Court's attention a crucial distinction between the instant case and this Court's recent decision in *United States v. John Doe, Inc. I*, No. 85-1613 (U.S. Apr. 21, 1987). Because of this distinction, *Doe* did not resolve the important questions presented in this case. To resolve these important questions, on which the circuit courts are divided, petitioners request that the Court grant certiorari in this case.

In *Doe*, this Court held that continued use of certain grand jury materials by government attorneys who had lawfully obtained access to the materials in the course

of a grand jury investigation did not constitute a disclosure within the meaning of Fed. R. Crim. P. 6(e) if the attorneys did not disclose the materials to others who had not previously reviewed them. The Rule, then, did not prevent the attorneys *themselves* from continuing to use the materials.

Unlike the *Doe* case, this case cannot be resolved on the ground that no future disclosures are contemplated. Here, it is quite clear that the grand jury materials will be revealed to additional personnel who have not previously reviewed them. *See* Petition For A Writ Of Certiorari at 5, 7 n.6.[1] And, the Court made it clear in *Doe* that when grand jury materials are revealed to a person who has not previously seen them, a disclosure governed by Fed. R. Crim. P. 6(e) occurs: "Rule 6(e) prohibits those with information about the workings of the grand jury from revealing such information to other persons who are not authorized to have access to it under the Rule." *United States v. John Doe, Inc. I*, No. 85-1613, Slip op. at 5. *See also United States v. Sells Engineering, Inc.*, 463 U.S. 418, 422-23 n.6 (1983); *In re Sells*, 719 F.2d 985 (9th Cir. 1983).

The question presented in this case is whether the disclosures contemplated by the government are permissible under Fed. R. Crim. P. 6(e) in light of this Court's decisions in *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983), and *United States v. Baggot*, 463 U.S. 476 (1983). This issue was in no way addressed by the *Doe* case.

Petitioners submit that, for the reasons stated in our petition for a writ of certiorari, the decision of the Fourth Circuit to permit these future disclosures is in direct conflict with the decision of the Ninth Circuit in

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[1] Of course, as noted in our petition for a writ of certiorari, the materials will also continue to be utilized by persons who have already had some exposure to them.

In re Sells, 719 F.2d 985 (1983) and with prior decisions of this Court. To resolve this conflict the petition for a writ of certiorari should be granted.

Respectfully submitted,

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